

General Rules Governing Court Proceedings

(Including MCR Subchapters 2.000 and 8.100)

1.1	Access to Court Proceedings and Records	1
1.2	Waiver of Fees	5
1.3	Oaths or Affirmations	6
1.4	Disqualification of Judge	9
1.5	Attorney Misconduct.....	12
1.6	Order to Appear	13
1.7	Contempt of Court.....	15
1.8	Personal Protection Orders (PPOs)	18
1.9	Discretion	20

1.1 Access to Court Proceedings and Records

US Const, Am VI

Const 1963, art 1, § 20

MCL 600.1420 Courts; sittings to be public; exceptions

MCR 8.116(D)(1) Access to court proceedings

MCR 8.119(E)–(F) Access to court records; sealed records

A. Generally

A criminal defendant is entitled to a “public trial.” US Const, Am VI, and Const 1963, art 1, § 20. A criminal trial must be open to the public, unless the court finds that no alternative short of closure will adequately assure a fair trial for the accused. *Richmond Newspapers, Inc v Virginia*, 448 US 555, 580–581 (1980) (opinion of Burger, CJ). See *Sheppard v Maxwell*, 384 US 333, 358–363 (1966), for a list of alternatives to closing a proceeding that a court must consider).*

A court has statutory authority to exclude certain persons from the courtroom or limit the disclosure of information in the courtroom. See, e.g., MCL 600.1420 (court may exclude minors who are not parties or witnesses in cases of scandal or immorality) and MCL 750.520k (in a criminal sexual conduct case, a court may suppress the victim’s and actor’s names and details of the alleged offense until after the preliminary examination).

People v Kline, 197 Mich App 165, 169-171 (1992) addresses partial closure of the courtroom. “Because the effect of a partial closure does not reach the

*See also
Section 2.25
(child witness).

level of total closure, only a substantial, rather than a compelling, reason for the closure is necessary.” *Id.* at 170.

The right to a “public trial” extends to pretrial hearings, *Waller v Georgia*, 467 US 39, 43–47 (1984), and the jury selection process, *Press-Enterprise Co v Superior Court*, 464 US 501, 511 (1984).

The presumption that criminal proceedings will be open to the public may be overcome only by “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Id.* at 510. The court must make particularized findings as to the necessity for closure. *In re Closure of Jury Voir Dire*, 204 Mich App 592, 595–596 (1994). The court must conduct a hearing as soon as practicable if making a decision to limit access. *Capital Cities Broadcasting Corp v Tenth District Judge*, 91 Mich App 655, 657 (1979). “The parties may not, by their mere agreement, empower a judge to exclude the public and press.” *Detroit Free Press v Macomb Circuit Judge*, 405 Mich 544, 549 (1979).

B. Limits on Access to Court Proceedings—MCR 8.116(D)

MCR 8.116(D)(1) states as follows:

“(1) Except as otherwise provided by statute or court rule, a court may not limit access by the public to a court proceeding unless

(a) a party has filed a written motion that identifies the specific interest to be protected, or the court sua sponte has identified a specific interest to be protected, and the court determines that the interest outweighs the right of access;

(b) the denial of access is narrowly tailored to accommodate the interest to be protected, and there is no less restrictive means to adequately and effectively protect the interest; and

(c) the court states on the record the specific reasons for the decision to limit access to the proceeding.”

Any person may file a motion to set aside an order entered under MCR 8.116(D)(1) or object to its entry. MCR 2.119 governs the proceedings on such a motion or objection. MCR 8.116(D)(2).

The court must forward a copy of the order to the State Court Administrative Office. MCR 8.116(D)(3).

C. Media Access to Court Proceedings

The press has no greater right of access to court proceedings than does the public. *In re Midland Pub'g Co, Inc*, 420 Mich 148, 162 (1984).

See Administrative Order No 1989-1, 432 Mich cxii (1989), regarding film or electronic media coverage.

D. “Gag Orders”

The term “gag order” refers to a court order directed to attorneys, witnesses, and parties prohibiting them from discussing a case with reporters, or to a court order prohibiting reporters from publishing information related to a case. The latter type of “gag order” has been held unconstitutional. *Nebraska Press Ass’n v Stuart*, 427 US 539, 556 (1976) (“The [United States Supreme] Court has interpreted [first amendment] guarantees to afford special protection against orders that [impose a prior restraint on speech by] prohibit[ing] the publication or broadcast of particular information or commentary.”)

MCR 8.116(D)(1) should be followed in assessing whether to grant the former type of “gag order.” A gag order that is reasonable and serves a legitimate purpose that overrides any limited incidental affects on first amendment rights is permissible. *In re Detroit Free Press*, 463 Mich 936 (2000) (Corrigan, CJ, concurring).

E. Access to Court Files and Records—MCR 8.119(E)(1)

Unless a file, document, or information in a file or document is made confidential pursuant to statute, court rule or court order under MCR 8.119(F), any person may inspect a file or document. MCR 8.119(E)(1). If a case is non-public pursuant to statute or court rule, all material related to the case should also be treated non-public, including notes, recordings and transcripts.

Access to court records can be restricted by the Legislature. *In re Midland Pub'g Co, Inc*, 420 Mich 148, 159 (1984). For example, MCL 750.520k allows a court, in a criminal sexual conduct case, to order the suppression of the victim’s and actor’s names and details of the alleged offense until after the preliminary examination. For a partial listing of statutes, court rules, and cases that restrict public access to court records, see the State Court Administrative Office’s Case File Management Standards.

To determine whether a right of access exists regarding a document, a court should ask whether the document has historically been open to the public and press, and whether access “plays a significant positive role in the function of the particular process in question.” *In re People v Atkins*, 444 Mich 737, 740 (1994), quoting *Press Enterprise Co v Superior Court*, 478 US 1, 8 (1986).

“[T]he press has a qualified right of postverdict access to jurors’ names and addresses, subject to the trial court’s discretion to fashion an order that takes into account the competing interest of juror safety and any other interests that may be implicated by the court’s order.” *In re Disclosure of Juror Names (People v Mitchell)*, 233 Mich App 604, 630–631 (1999). If a court determines that jurors’ safety concerns are “legitimate and reasonable,” the court may deny media access to jurors’ names and addresses. *Id.* at 630. However, jurors’ privacy concerns alone are insufficient to deny access to jurors’ names. *Id.*

In civil cases, the court is authorized to issue protective orders as part of discovery proceedings. MCR 2.302(C).

Reports and records may be privileged or confidential and their treatment should be scrutinized in each case. Examples are substance abuse evaluation and treatment records, medical records and reports, and psychological/psychiatric records and reports.*

*See also
Section 2.10 on
privileges.

F. Limits on Access to Court Records—MCR 8.119(F)

MCR 8.119(F)(1)–(3) state as follows:

“(1) Except as otherwise provided by statute or court rule, a court may not enter an order that seals courts records, in whole or in part, in any action or proceeding, unless

(a) a party has filed a written motion that identifies the specific interest to be protected,

(b) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order, and

(c) there is no less restrictive means to adequately and effectively protect the specific interest asserted.

“(2) In determining whether good cause has been shown, the court must consider,

(a) the interests of the parties, including, where there is an allegation of domestic violence, the safety of the alleged or potential victim of the domestic violence, and

(b) the interest of the public.

“(3) The court must provide any interested person the opportunity to be heard concerning the sealing of the records.”

MCR 8.119(F) is not intended to limit a court's authority to issue protective orders under MCR 2.302(C) for trade secrets, etc. MCR 8.119(F)(4).

"Any person may file a motion to set aside an order that disposes of a motion to seal the record, or an objection to entry of a proposed order. MCR 2.119 governs the proceedings on such a motion or objection." MCR 8.119(F)(6).

If a court grants a motion to seal a court record, the court must send a copy of the order to the Clerk of the Michigan Supreme Court and the State Court Administrative Office. MCR 8.119(F)(7).

1.2 Waiver of Fees

MCR 2.002 Waiver or suspension of fees and costs for indigent persons

A. Generally

MCR 2.002 authorizes a trial court to relieve an indigent person of his obligation to pay filing fees and assures that a complainant will not be denied access to the courts on the basis of indigence. *Lewis v Dep't of Corrections*, 232 Mich App 575, 579 (1998) and *Wells v Dep't of Corr*, 447 Mich 415, 419 (1994).

MCR 2.002(D) places the initial burden of establishing indigence on the individual requesting a waiver of filing fees.

For instances in which fees are not required see MCL 722.727; MCL 722.904(2)(f); MCR 3.703(A).

B. Reinstatement of Fees

The court may reinstate the fees and costs previously waived, if, at the conclusion of the litigation, the reason for the waiver or suspension no longer exists. MCR 2.002(G).

Prior to revoking a previously granted waiver or suspension of filing fees and costs pursuant to MCR 2.002(G), a court must determine whether the litigant is indigent at the time of the revocation of the waiver or suspension. *Martin v Dep't of Corr (On Remand)*, 201 Mich App 331, 335 (1993).

A court reinstating the obligation to pay filing fees is not required to establish a petitioner's indigence in any particular manner. *Lewis v Dep't of Corr*, 232 Mich App 575, 582 (1998).

When the suspension of filing fees was due to the court process, not the petitioner's indigence, and there was no determination that the petitioner would forever be unable to pay the fees, the trial court did not abuse its

discretion in reinstating the obligation to pay suspended filing fees. *Koss v Dep't of Corr*, 184 Mich App 614, 617 (1990).

The trial court noted that it suspended the filing fees to ensure timely review of the prisoner petitioner's complaint. *Langworthy v Dep't of Corrections*, 192 Mich App 443, 445-446 (1992). Thus, it did not abuse its discretion in reinstating petitioner's obligations to pay the fees following review of petitioner's complaint. *Id.*

C. Standard of Review

A trial court's decision to grant a defendant's motion for production of transcripts at public expense is reviewed for an abuse of discretion. *People v Cross*, 30 Mich App 326, 336 (1971).

1.3 Oaths or Affirmations

Const 1963, art 11, § 1

MCL 8.3k "Oath" and "sworn" defined

MCL 339.506(1) Interpreter's oath

MCL 600.1432 Mode of administering oaths

MCL 600.1440 Persons who may administer oaths

MCL 767.9 Form of grand jury oath

MCL 768.15 Affirmation in lieu of oath

MCR 2.511(G) Oath of jurors

MRE 603 Oath or affirmation

MRE 604 Interpreters

M Civ JI 1.04 Juror oath

M Civ JI 1.10 Juror oath

CJ2d 1.4 Juror oath

CJ2d 2.1 Juror oath

A. Juror Oath Before Voir Dire

“Do you solemnly swear or affirm that you will truthfully and completely answer all questions about your qualifications to serve as jurors in this case?” M Civ JI 1.04. CJI2d 1.4 is substantially similar.

B. Juror Oath Following Selection

“Does each of you solemnly swear or affirm that, in this case now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God?” M Civ JI 1.10. CJI2d 2.1 is substantially similar.

The jury oath is required by both statute and court rule and is not a mere formality. *People v Pribble*, 72 Mich App 219, 223-225 (1976). “The oath is designed to protect the fundamental right of a trial by an impartial jury.” *Id.* at 224. See also *People v Clemons*, 177 Mich App 523, 528-529 (1989). “[J]eopardy attaches when the jury is impaneled and sworn.” *Pribble, supra* at 223.

C. Oath for Bailiff Before Deliberation

“You do solemnly swear or affirm that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial from separating from each other; that you will not suffer any communication to be made to them, or any of them, orally or otherwise; that you will not communicate with them, or any of them orally or otherwise, except by the order of this court, or to ask them if they have agreed on their verdict, until they shall be discharged; and that you will not, before they render their verdict, communicate to any person the state of their deliberations or the verdict they have agreed upon, so help you God.” MCL 768.16.

D. Oath for Witness

MRE 603 states that “[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to do so.” Traditionally, courts have used the following form:

“Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?”

E. Oath for Interpreter

An interpreter must be administered an oath or affirmation “to make a true translation.” MRE 604. MCL 393.506(1) requires an interpreter for a deaf person to make an oath or affirmation to make a true interpretation in an understandable manner in the English language to the best of the interpreter’s ability. The following may be used for both foreign language and sign language interpreters:

“Do you solemnly swear or affirm that you will make a true and understandable interpretation of the witness and that you will accurately interpret the statements made by the witness to the best of your ability?”

F. Child Witness

Former MCL 600.2163, which was repealed in 1998, provided that when a witness under 10 years of age was produced, the court was required to examine the child to determine his or her competency. If the court found that the child was competent to be a witness, he or she could give “a promise to tell the truth instead of [an] oath or affirmation. See now MRE 601. In this situation, it is probably best to merely ask the child, “Do you promise to tell the truth”? Then address any competency issue if it is raised.

G. Oath for the Grand Jury

MCL 767.9 contains an oath to be used when a grand jury is sworn.

H. Oath for New Attorney

See State Bar Rule 15, § 3.

I. Suggested Caution to Witness

I instruct you not to discuss this case or your possible testimony with any other witness until you learn the case has been concluded.

Give this instruction when witnesses have been excluded under MRE 615.

J. Oath for Public Officers

There is a constitutional oath of office for all public officers at Const 1963, art 11, § 1.

“All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do

solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of according to the best of my ability. No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust.”

1.4 Disqualification of Judge

MCR 2.003 Disqualification of judge

Code of Judicial Conduct, Canon 3(C) Disqualification raised by judge

J-6 (September 20, 1996) Formal judicial ethics opinion discussing disqualification

JI-34 (December 21, 1990) Informal ethics opinion regarding judges who are former prosecuting attorneys

JI-44 (November 1, 1991) Informal ethics opinion regarding “personal acquaintances” of a judge and “perpetual recusal”

A. Grounds for Disqualification

MCR 2.003(B) sets forth the grounds for disqualification of a judge. That rule states as follows:

“(B) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:

“(1) The judge is personally biased or prejudiced for or against a party or attorney.

“(2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

“(3) The judge has been consulted or employed as an attorney in the matter in controversy.

“(4) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

“(5) The judge knows that he or she, individually or as a fiduciary, or the judge’s spouse, parent or child wherever residing, or any other member of the judge’s family

residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.

“(6) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(a) is a party to the proceeding, or an officer, director or trustee of a party;

(b) is acting as a lawyer in the proceeding;

(c) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(d) is to the judge's knowledge likely to be a material witness in the proceeding.

“A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.”

“A judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(B).” Code of Judicial Conduct, Canon 3(C).

MCR 2.003(B)(2) mandates disqualification if a judge is personally biased or prejudiced for or against a party or attorney. In most cases, a showing of actual personal bias or prejudice is required. *People v Coones*, 216 Mich App 721, 726 (1996). However, no showing of actual bias or prejudice is required if a litigant is denied his or her due process right to an unbiased and impartial decisionmaker because the judge “might have prejudged the case due to prior participation [in the case] as an accuser, investigator, fact finder or initial decisionmaker.” *Crampton v Dep't of State*, 395 Mich 347, 351 (1975). *Crampton* also discusses other factual situations in which a showing of actual bias or prejudice is not required.

“Letters, or even complaints, to the Judicial Tenure Commission alone do not require disqualification of a trial judge.” *Ireland v Smith*, 214 Mich App 235, 249 (1995). Disqualification is not required when the moving party has filed a complaint with the Judicial Tenure Commission until the judge has been privately censured or a complaint has been filed by the Judicial Tenure Commission itself. *People v Bero*, 168 Mich App 545, 552 (1988); *Czuprynski v Bay Circuit Judge*, 166 Mich App 118, 126-127 (1988).

A judge may not “perpetually recuse” himself or herself from cases of a particular advocate or particular party because of derogatory comments made against the judge by the advocate or the party in a particular case, or because of the judge’s personal dislike of a particular advocate. *Jl-44* (November 1, 1991).

B. Motion to Disqualify

If a motion is filed, it must be filed within 14 days after the moving party discovers the ground for disqualification or, if discovery of the ground for disqualification occurs within 14 days of the trial date, “the motion must be made forthwith.” MCR 2.003(C)(1). The “untimeliness[of a motion], including delay in waiving jury trial, is a factor in deciding whether the motion should be granted.” *Id.* A party who failed to move for disqualification within 14 days of discovering the alleged grounds for disqualification pursuant to MCR 2.003(C)(1) may not raise the issue for the first time on appeal. *Fischhaber v Gen Motors Corp*, 174 Mich App 450, 455-456 (1988).

A motion must be supported by an affidavit setting forth all grounds for disqualification known at the time the motion is filed. MCR 2.003(C)(2). The affidavit must be made on personal knowledge, be factually specific, and demonstrate that the affiant is competent to testify to the facts stated in the affidavit. MCR 2.119(B)(1)(a)–(c). The challenged judge decides the motion. MCR 2.003(C)(3).

If the challenged judge denies the motion, and if requested by a party, the motion shall be referred to the chief judge who shall decide it de novo. MCR 2.003(C)(3)(a). If the challenged judge is the sole judge or chief judge of the court, and if requested by a party, the motion must be referred to the SCAO, which must assign it to another judge, who must decide the motion de novo. *Id.* “[T]o preserve for appellate review the issue of a denial of a motion for disqualification of a trial court judge, a party must request referral to the chief judge of the trial court after the trial court judge’s denial of the party’s motion.” *Welch v Dist Court*, 215 Mich App 253, 258 (1996), citing *Law Offices of Lawrence J Stockler PC v Rose*, 174 Mich App 14, 23 (1989) and MCR 2.003(C)(3)(a).

If the motion is granted, “the action shall be assigned to another judge of the same court, or, if one is not available, the State Court Administrator shall assign another judge.” MCR 2.003(C)(4).

C. Burden of Proof

“The party moving for the disqualification [of the judge] bears the burden of proving actual bias or prejudice.” *People v Houston*, 179 Mich App 753, 756 (1989). “A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.” *Rust v Rust*, 143 Mich App 704, 707 (1985). Bias or prejudice

in fact must be shown, which generally cannot be predicated solely on the judge's prior rulings. *Kolowich v Ferguson*, 264 Mich 668, 670 (1933), and *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597 (2001).

*Personal bias or prejudice regarding an attorney may be remitted. J-6 (September 20, 1996).

D. Remittal of Disqualification

MCR 2.003(D) provides that although there may be grounds for disqualification, the judge may still hear the case if the parties waive disqualification and the judge is willing to participate. However, disqualification may not be waived if it is based on personal bias or prejudice concerning a party.* Moreover, unless the attorneys jointly propose the remittal, the judge should be careful not to solicit or seek or hear comment regarding the waiver so there is no appearance that the waiver was coerced. SCAO Form MC 272, Remittal of Disqualification, can be used for the waiver process.

E. Standard of Review

On appeal, a trial court's findings of fact on a motion to disqualify a judge are reviewed for an abuse of discretion, and the judge's application of the law to the facts is reviewed de novo. *Cain v Dep't of Corr*, 451 Mich 470, 503 n 38 (1996). The reviewing court must be provided with transcripts of the hearings and affidavits. *MacDonald v Ford Motor Co*, 117 Mich App 538, 542 (1982); *Czuprynski v Bay Circuit Judge*, 166 Mich App 118, 124 (1988).

F. State Bar Ethics Committee

On a pending case, the court may request an ethics opinion from the State Bar Ethics Committee. The court is not obligated to follow the opinion, but it would presumably be helpful. Informal contacts can be made with both the State Court Administrative Office and the State Bar, which are willing to provide guidance. Although the Judicial Tenure Commission no longer provides opinions, there are a number of earlier rulings and opinions which may be helpful.

1.5 Attorney Misconduct

A. Attorney's Duty to the Court

An attorney is responsible for aiding the administration of justice. An attorney has a duty to uphold the legal process and act in conformity with standards imposed upon members of the bar. These standards include the rules of professional responsibility and judicial conduct adopted by the Supreme Court. MCR 9.103(A). Grounds for discipline include conduct that is prejudicial to the proper administration of justice or that violates the Michigan Rules of Professional Conduct (MRPC). See MCR 9.104(A)(1) and (4).

B. Attorney's Duty to the Client

An attorney must represent and advocate on behalf of the client. In doing so the attorney must not make inflammatory remarks with the intent to prejudice the jury. Each party is entitled to a fair trial uninfluenced by appeals to passion. *Wayne Co Rd Comm'n v GLS LeasCo, Inc*, 394 Mich 126, 131 (1975). For instance, it is improper and prejudicial for a prosecutor to appeal to the jurors' civic duty. *People v Weatherspoon*, 171 Mich App 549, 558 (1988).*

*See Section 4.45(B)–(C) for discussion of prosecutorial comments.

The severity and repetitiveness of prejudicial remarks are considered when determining if a new trial is warranted. *Wayne County Road Comm'n, supra* at 131. Whereas one remark may not prejudice the jury, repetitive remarks may be so damaging that a new trial is required. Often the harmful effects of prejudicial remarks can be corrected through the court's instruction to the jury. The judge may prevent a miscarriage of justice by explaining to jurors that attorney comments are not evidence. *People v Johnson*, 382 Mich 632, 649 (1969). See also *Wilson v Stilwill*, 411 Mich 587, 605 (1981).

C. Motion to Disqualify Attorney

Although not specifically addressed by a court rule, case law suggests that the court has the authority to consider a motion to disqualify counsel. Typically a motion to disqualify would be based on an alleged conflict of interest. See MRPC 1.7 Comment, 1.9, and 1.10. Another potential ground for disqualification may arise if the lawyer is a potential witness. MRPC 3.7. The determination that a prosecutor should be disqualified based on a conflict of interest is a question of fact reviewed for clear legal error. See *People v Mayhew*, 236 Mich App 112, 126 (1999). A conflict of interest exists where “the prosecutor has a personal, financial, or emotional interest in the litigation or a personal relationship with the accused.” *Id.* at 126-127. A conflict of interest also exists where the prosecutor was privy to confidential information while in an attorney-client relationship. *People v Herrick*, 216 Mich App 594, 599 (1996). For a discussion of the disqualification of plaintiff's counsel in a civil case, see *Kalamazoo v Michigan Disposal Service Corp*, 125 F Supp 2d 219 (WD Mich, 2000), *aff'd* 151 F Supp 2d 913 (WD Mich, 2001).

1.6 Order to Appear

MCL 600.1455(1) Courts of record; power to issue subpoena

MCR 2.506 Subpoena; order to attend

A. In General

MCL 600.1455(1) authorizes courts of record to issue subpoenas requiring the testimony of witnesses, and MCR 2.506 regulates that process. There are a

number of specialized statutes providing for subpoenas in particular situations. In addition to requiring the attendance of a party or witness, the court is authorized to subpoena a representative of an insurance carrier for a party, “with information and authority adequate for responsible and effective participation in settlement discussions,” to be present or immediately available at trial. MCR 2.506(A)(2). Subpoenas may be signed by an attorney of record in the action or by the clerk of the court. MCR 2.506(B)(1). The court may enforce its subpoenas using its contempt power, MCR 2.506(E), and is provided other enforcement options by MCR 2.506(F).

One of the rights of an accused in criminal prosecutions is “to have compulsory process for obtaining witnesses in his or her favor.” Const 1963, art 1, § 20. See also MCL 767.32 and MCL 775.15. The right to offer testimony of witnesses and compel their attendance is the right to present a defense. *Washington v Texas*, 388 US 14, 19 (1967). A criminal defendant’s right to compulsory process, though fundamental, is not absolute. *People v McFall*, 224 Mich App 403, 408 (1997). It requires a showing that the witness’ testimony would be both material and favorable to the defense. *Id.* Matters of compulsory process, as well as trial continuances to obtain a witness, are decided at the discretion of the trial court. *Id.* at 411; *In re Jackson*, 199 Mich App 22, 28 (1993).

B. Subpoena for Party

Absent a subpoena or court order to appear, a defendant in a civil case is not required to appear for trial. *Rocky Produce, Inc v Frontera*, 181 Mich App 516, 517 (1989).

C. Subpoena Duces Tecum

A party or witness may be required to bring specified notes, records, documents, photographs or other portable tangible things. MCR 2.506(A)(1).

Subpoenas issued pursuant to MCR 2.506(A)(1) “have no relation to subpoenas issued in conjunction with discovery proceedings. The end of the discovery period does not preclude the issuance of trial subpoenas, including subpoenas duces tecum, even if the records to be produced were not the subject of discovery.” *Boccarossa v Dep’t of Transportation*, 190 Mich App 313, 316 (1991).*

A subpoena for hospital medical records is controlled by MCR 2.506(I).

D. Motion to Quash Subpoena

MCR 2.506(H) provides that a person served with a subpoena may appear and challenge the subpoena. For good cause, the witness may be excused. MCR 2.506(H)(3). Otherwise, the person must appear unless excused by the court or the party who had the subpoena issued. MCR 2.506(H)(4).

*See also MCR 2.314 and MCR 2.310, which provide for the discovery of records of a party or nonparty.

1.7 Contempt of Court

MCL 600.1701 et seq. Contempt of court

MCR 3.606 Contempts outside the immediate presence of court

A. Introduction

MCL 600.1701 defines a court's power to punish contempt by fine or imprisonment or both.* The statute sets forth specific parties and situations. The courts also have inherent contempt powers. *In re Huff*, 352 Mich 402, 415-416 (1958). Contempt may be either civil or criminal and either direct or indirect. Direct contempt occurs in the immediate view and presence of the court; indirect contempt is outside of the immediate view and presence of the court. The purpose of civil contempt is to coerce compliance with a court's order; the purpose of criminal contempt is to punish for past conduct. *Jaikins v Jaikins*, 12 Mich App 115, 120 (1968).

For civil contempt, the trial court must find by a preponderance of the evidence that the contempt occurred. *In re Contempt of ACIA*, 243 Mich App 697, 712 (2000). For a finding of criminal contempt, the contempt must be proven beyond a reasonable doubt. *Id.* at 714.

An excellent summary of the law and procedure governing contempt is found in *In re Contempt of Dudzinski*, 257 Mich App 96 (2003).

*See the Contempt of Court Script in the Appendix. For more detailed discussion, see *Contempt of Court Benchbook (Revised Edition)* (MJL, 2000).

B. Direct Contempt—In the Presence of the Court

MCL 600.1711(1) provides that the court has authority to summarily punish by fine or imprisonment or both contempt that occurs in its immediate view and presence.

If contempt occurs in the immediate view and presence of the court and the judge defers consideration of a contempt citation until after the conclusion of the trial, the charges must be considered and heard before a different judge. *In re Contempt of Scharg*, 207 Mich App 438, 439-440 (1994).

The rules of evidence do not apply, except those related to privilege. MRE 1101(b)(4).

C. Indirect Contempt—Outside the Presence of Court

If the contempt is committed outside the immediate view and presence of the court, it is not subject to summary punishment, and the appropriate process is a show cause hearing. *In re Contempt of McRipley*, 204 Mich App 298, 301 (1994).

MCL 600.1711(2) provides that the court may punish contempt committed outside its presence “after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend.”

MCR 3.606 sets forth contempt procedures for alleged contempt committed outside the presence of the court. An ex-parte motion, supported by an affidavit of facts, requesting an order to show cause is required to bring the matter before the court. MCR 3.606(A)(1). The order to show cause must be personally served, unless the court orders otherwise. MCR 2.107(B)(1)(b). In addition, the court can issue a bench warrant. MCR 3.606(A)(2).

There are also statutes or court rules that may cover specific situations such as visitation violations, so the court should consider the nature of the alleged contempt and determine whether there is an applicable statute or court rule.

The rules of evidence apply. MRE 1101(a) and (b)(4).

D. Civil or Criminal Contempt

The first step in any contempt proceeding is to determine whether the alleged conduct is subject to criminal or civil contempt sanctions because due process requires that the person charged be advised, at the outset, whether the proceedings involve civil or criminal contempt. *In re Contempt of Rochlin*, 186 Mich App 639, 648-649 (1990).

The rules of evidence apply except when direct contempt is summarily punished. If an order to show cause is used, it does not shift the burden of proof or the burden of going forward.

Civil contempt is coercive and intended to compel the offending person to take action that he or she is capable of taking, to purge the contempt. It is prospective. Willful disobedience is not necessary for civil contempt. *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 499-501 (2000).

The standard of proof for civil contempt has varied. In some cases, a preponderance of the evidence standard has been applied. See *Jaikins v Jaikins*, 12 Mich App 115, 121 (1968). Other cases have applied a “clear and unequivocal” standard. See *People v Matish*, 384 Mich 568, 572 (1971), and *In re Contempt of Robertson*, 209 Mich App 433, 439 (1995).

Criminal contempt punishes past conduct and is punitive. With criminal contempt, the accused has the due process rights that apply to a criminal defendant, except there is no right to a jury trial. In a criminal proceeding, the standard of proof is beyond a reasonable doubt.

The elements necessary to support a conviction of criminal contempt are:

- (1) willful disregard or disobedience of a court order, and

(2) the contempt is clearly and unequivocally shown.

In re Contempt of Dougherty, 429 Mich 81 (1987); *In re Contempt of O'Neil*, 154 Mich App 245, 247 (1986); *People v MacLean*, 168 Mich App 577, 579 (1988).

E. Right to Counsel

When summary proceedings are used for contempt that occurs in the presence of the court, there apparently is no right to counsel. However if the hearing is delayed (i.e. the contempt did not occur in the court's presence), there is a right to counsel if the defendant faces the possibility of jail. See *Argersinger v Hamlin*, 407 US 25, 37-38 (1972). The Michigan Supreme Court has held "that conviction for criminal contempt can be sustained only upon a record which shows compliance with the procedural safeguards established for the prosecution of any other crime of equal gravity." *People v Johns*, 384 Mich 325, 333 (1971). For civil contempt (which by definition are not criminal proceedings), there typically is no right to counsel. See *Sword v Sword*, 399 Mich 367, 373, 380-381 (1976). However, "the Due Process Clause of the Fourteenth Amendment of the United States Constitution precludes incarceration of an indigent defendant if he has been denied counsel in a contempt proceeding for failure to pay child support." *Mead v Batchlor*, 435 Mich 480, 483 (1990). "[T]he due process right to appointed counsel is triggered by an indigent's fundamental interest in physical liberty, and not by the civil or criminal nature of the proceeding." *Id.* at 498.

F. Punishment

Three kinds of sanctions are available to redress a contemnor's behavior: (1) civil coercion to force compliance with an order; (2) criminal punishment to vindicate the court's authority; and (3) civil compensatory relief for the complainant. *In re Contempt of Dougherty*, 429 Mich 81, 98 (1987); *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 499 (2000). When the contempt is civil and consists of the omission to do what is still in the power of the contemnor to do, imprisonment may be imposed until the contemnor performs or no longer has the power to perform the act or duty and pays any fine and costs. MCL 600.1715(2); *Dougherty, supra* at 96; *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 711-712 (2000). Otherwise, the criminal sanctions for committing a forbidden act are generally limited to a fine of up to \$250 or imprisonment for up to thirty days, or both. MCL 600.1715(1); *Dougherty, supra* at 97; *Auto Club, supra* at 711.

MCL 600.1715(1) provides that contempt may be punished by a fine of not more than \$250.00 and imprisonment not to exceed thirty days, or both, unless otherwise provided by law. MCL 600.1715(2) provides that if the contempt consists of omissions that the person can still perform, imprisonment shall be terminated when he or she performs the act or duty or no longer has the power to do so, which shall be specified in the order of commitment, and when he or

she pays the fine, costs, and expenses, which shall also be specified in the order of commitment.

There are Michigan statutes that provide more specific penalties for particular types of contempt. See, for example, the personal protection order statutes, MCL 600.2950 and MCL 600.2950a, and the statutes covering violation of a visitation order, MCL 552.641 et seq.

A court may also punish contempt by denying court processes to one who is in contempt of a court order. *Homestead Dev Co v Holly Twp*, 178 Mich App 239, 247 (1989).

A court may also order compensation for loss or injury resulting from the violation of a court order. *In re Contempt of Dougherty*, 429 Mich 81, 98 (1987). This subject is covered in Stockmeyer, *Compensatory Contempt*, 74 Mich B J 296 (1995).

G. Sanctions Other Than Contempt

A court may have the inherent power to impose a civil remedial sanction, such as actual costs, for the improper conduct of a litigant or attorney appearing before the court. See *Brenner v Kolk*, 226 Mich App 149, 159-160 (1997).

H. Standard of Review

The issuance of an order of contempt is in the sound discretion of the trial court and will be reviewed for abuse of discretion. *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 499 (2000). See also *Deal v Deal*, 197 Mich App 739, 743 (1993); *In re Contempt of Dudzinski*, 257 Mich App 96, 99 (2003).

1.8 Personal Protection Orders (PPOs)

MCL 600.2950 Domestic relationship PPO

MCL 600.2950a Non-domestic stalking PPO

MCR 3.701 et seq. Personal protection proceedings

Checklists/scripts for arraignment, hearing, plea, and sentencing are in the appendix.*

*For more detailed discussion, see Lovik, *Domestic Violence Benchbook: A Guide to Civil & Criminal Proceedings (3d Edition)* (MJI, 2004), Chapters 6–8.

A. Obtaining or Terminating a PPO

A domestic relationship PPO must restrain a person with a relationship to the petitioner as specified in MCL 600.2950 from acts listed in that statute. A non-domestic stalking PPO under MCL 600.2950a must be based on alleged conduct that constitutes stalking or aggravated stalking and may restrain any individual from such conduct. *Pobursky v Gee*, 249 Mich App 44, 47 (2001).

A personal protection order can limit custody and parenting time. *Brandt v Brandt*, 250 Mich App 68, 70–71 (2002).

A petitioner bears the burden of proof when seeking to obtain an ex parte PPO. *Kampf v Kampf*, 237 Mich 377, 386 (1999). Under MCR 3.310(B)(5), the burden of justifying continuation of a PPO granted ex parte is on the applicant for the restraining order. Hence, the petitioner will have the burden of persuasion in a hearing held on a motion to terminate or modify an ex parte PPO. *Pickering v Pickering*, 253 Mich App 694, 699 (2002).

Contempt proceedings are governed by MCR 3.708. MCR 3.708(H)(1) specifically states that a respondent is not entitled to a jury trial.

B. Hearing—MCR 3.708(H)(1)-(4)

If a respondent is held in custody, a hearing for contempt of a PPO must be held within 72 hours of arraignment, unless either the prosecution or the defense requests an extension. MCR 3.708(F)(1)(a). Failure to do so does not rescind a PPO, and a court may not dismiss the proceedings or impose any other sanction. MCL 764.15b(8).

The burden of proof is beyond a reasonable doubt for criminal contempt and a preponderance of the evidence for civil contempt. MCR 3.708(H)(3).

The rules of evidence apply. MCR 3.708(H)(3).

The hearing can be delayed when there is a pending criminal charge. MCR 3.708(F)(1)(c).

Judicial findings at the conclusion of a hearing are required. MCR 3.708(H)(4).

C. Sentencing—MCR 3.708(H)(5)

Because violation proceedings are contempt proceedings and not criminal proceedings, a respondent has no right to allocution.

MCR 3.708(H)(5) provides:

“(a) If the respondent pleads or is found guilty of criminal contempt, the court shall impose a sentence of incarceration for no more than 93 days and may impose a fine of not more than \$500.00.

“(b) If the respondent pleads or is found guilty of civil contempt, the court shall impose a fine or imprisonment as specified in MCL 600.1715 and 600.1721. . . .”*

*See Section 1.7(F), above.

D. Multiple Punishments

In the case of PPO violations, the Michigan Legislature has clearly indicated its intent that criminal contempt sanctions be imposed in addition to other criminal penalties imposed for a separate criminal offense. MCL 600.2950(23) and MCL 600.2950a(20); *People v Coones*, 216 Mich App 721, 727-728 (1996).

1.9 Discretion

Many decisions of a judge are discretionary with the decision being reviewed for an abuse of that discretion. It is prudent for the judge to recognize his or her discretion when making such decisions.

A trial judge commits reversible error if he or she does not recognize that he or she has discretion and therefore fails or refuses to exercise it. *People v Merritt*, 396 Mich 67, 80 (1976).

To determine which decisions are discretionary, see the section on the relevant topic. Many sections contain a “standard of review” subsection that indicates if review is for abuse of discretion.

For a judicial decision or ruling to constitute an abuse of discretion, the Michigan Supreme Court has stated “the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.” *Spaulding v Spaulding*, 355 Mich 382, 384-385 (1959).

The next three chapters address questions of evidence and issues that may arise in civil and criminal proceedings. Many of these questions and issues require the court to exercise its discretion. The exercise of discretion may be guided by factors or elements that are referenced in the text.